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November 25, 2003

BY FACSIMILE

Clerk of the Court
U.S. District Court for the
Eastern District of Texas
100 East Houston, Room 125
Marshall, TX 75670
Fax: (903) 938-2651

Re: *Session v. Perry*, No. 2:03-CV-354 (Higginbotham, Ward, Rosenthal)

Dear Clerk:

Please find attached for filing in the above-captioned matter the Motion to Quash Subpoenas Ad Testificandum and Duces Tecum of Congressman Tom DeLay and Congressman Joe Barton. The original and one copy will be sent to you today by first class mail. If you have any questions, I may be reached at 202-662-5503.

Thank you for your assistance.

Sincerely,

Robert K. Kelner

Attachment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, ET AL.,	
Plaintiffs,	
v.	**No. 2:03-CV-354**
	(Higginbotham, Ward, Rosenthal)
RICK PERRY, ET AL.,	
Defendants.	

MOTION OF CONGRESSMAN TOM DELAY AND CONGRESSMAN JOE BARTON TO QUASH SUBPOENAS AD TESTIFICANDUM AND DUCES TECUM AND MEMORANDUM IN SUPPORT OF MOTION

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**Pro Hac Vice Motion Pending*

November 25, 2003

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FEDERAL STATUTES AND RULES

Congressman Tom DeLay, the Majority Leader of the United States House of Representatives, and Congressman Joe Barton, respectfully move for an order quashing non-party deposition subpoenas duces tecum served by plaintiffs.[1] The subpoenas would require the Members to sit for depositions and produce documents at a time of intense legislative activity, even though, as Members of Congress, they had no vote on the redistricting plan in the state legislature.

By precedent and long tradition, the judicial branch does not compel testimony by high government officials except in the most "exceptional" or "extraordinary" circumstances. The United States Court of Appeals for the Fifth Circuit applies this stringent rule, joining every other circuit court that has addressed the issue. *See In re Federal Deposit Insurance Corp.*, 58 F.3d 1055, 1060 (5th Cir. 1995) ("It is a settled rule in this circuit that exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted.") (*quoting In re Office of Inspector General*, 933 F.2d 276, 278 (5th Cir. 1991)). No "exceptional circumstances" exist here that would permit use of the judicial power to compel sitting Members of Congress to testify as non-party witnesses in this case. To the contrary, both Members would suffer substantial interference with performance of their official duties, and their testimony, even if compelled, would be irrelevant to the material issues before this Court.

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[1] The subpoenas for deposition testimony and documents, copies of which are attached hereto as Exhibit A, were issued by the U.S. District Court for the District of Columbia and served on November 19, 2003. They call for Congressmen DeLay and Barton to appear for depositions on November 25 and 26, 2003, respectively, in Washington, D.C. After consultation among counsel, it was agreed that the depositions would not take place before the week of December 1, 2003, to allow for consideration of this motion to quash. It was further agreed that this motion would be filed in the U.S. District Court for the Eastern District of Texas, to be adjudicated by this three-judge court, and that the depositions, if ordered by this Court, would take place either in Washington or in Houston. *See* Exhibit B attached hereto (November 22, 2003 Letter from Bobby R. Burchfield to J. Gerald Hebert).

So far as published precedents reveal, no court has ever compelled a sitting Member of Congress to submit to a deposition in a redistricting case, and for good reason. Every Member of Congress takes an interest in, and is affected by, redistricting. It is not difficult to imagine the mischief that would ensue if redistricting cases were permitted to become a vehicle for the compelled testimony of Members of Congress at the instigation of their political opponents. The opportunity to place Members under oath and question them regarding their political strategy and that of their political party would provide a fertile field for abuse.

Here, plaintiffs waited until a time of peak Congressional activity to issue sweeping subpoenas to two senior Members of Congress, including the second-ranking member of the House leadership. Unless quashed, the subpoenas would require both Members to devote substantial time, with little notice, to searching for documents, meeting with counsel, and attending depositions.

Moreover, the subpoenas are breathtakingly overbroad. If even a single e-mail responsive to the subpoenas has ever been deleted in the ordinary course of business, the subpoenas would require production of a copy of each Member's entire computer hard drive, presumably for unsupervised forensic analysis. This demand is made without regard to whether the hard drives contain confidential constituent communications or other documents that are absolutely protected from production under the Constitution's Speech and Debate Clause.[2] A

[2] *See* U.S. Const., Art I, Sec. 6, Cl. 1. The Speech and Debate Clause provides that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." It broadly protects anything done in any session by any Member in relation to the business of Congress. *See Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881); *Gravel v. United States*, 408 U.S. 606, 624 (1972); *United States v. Brewster*, 408 U.S. 501, 509, 512-13 (1972). The Court has read this provision to protect Members from compelled testimony not only about their speeches on the floor but also about Committee hearings, communications among Members, and documents such as Committee reports and constituent correspondence. *See Doe* (continued...)

court order compelling a United States Congressman to submit to such roving review, particularly in a redistricting case, would raise serious separation of powers concerns. *See Miller v. Johnson*, 515 U.S. 900, 916-17 (1995) (cautioning that courts must recognize "the intrusive potential of judicial intervention into the legislative realm, when . . . determining whether to permit discovery").

BACKGROUND

In the closing days of the first session of the 108th Congress, the United States House of Representatives has before it for consideration landmark legislation addressing Medicare reform and a prescription drug benefit for seniors, energy legislation, and a $1 trillion omnibus federal appropriations bill to fund the ongoing operations of the U.S. Government. Having worked past midnight on Friday, November 21, the House is currently on a brief recess for Thanksgiving week, but will shortly reconvene to complete work on the omnibus appropriations bill and, if necessary, continue work on comprehensive energy reform legislation.

Even during this recess, however, the work of the House leadership does not abate. In addition to conferring with constituents and taking some brief time to celebrate Thanksgiving with their families, the House leadership will be heavily occupied preparing to return to session for the important business that awaits in early December.

Tom DeLay is the Majority Leader of the United States House of Representatives, having been elected to that post by Members of the House Republican Conference in November 2002. He has represented the 22nd District of Texas in Congress since 1984. As House

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v. McMillan, 412 U.S. 306 (1973); *Gravel v. United States, supra; Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *see also Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir. 1984).

Majority Leader, Congressman DeLay works with committee chairmen and the rest of the House Republican leadership to define the legislative and policy agenda of the House. On a day-to-day basis, the Majority Leader is responsible for determining the legislative schedule by selecting which bills the House will consider and when they will be considered. This role places Congressman DeLay at the very center of the federal legislative process. As the second-ranking member of the House Republican leadership, under the Speaker of the House, he is frequently called upon to perform vital tasks necessary to ensure the smooth operation of the House and, in turn, the U.S. Government. Congressman DeLay personally has played a significant role in enacting key legislation such as welfare reform, trade promotion authority, and the Balanced Budget Act. Most recently, he has been heavily involved in efforts to enact major energy and Medicare reform legislation and an appropriations bill to fund U.S. Government operations for fiscal year 2004.

In addition to his duties as House Majority Leader, Congressman DeLay devotes substantial time to meetings and telephone calls with his constituents in the 22nd District, and to advocating on their behalf in Congress and before the Executive Branch.

Congressman Joe Barton is a nine-term member of the United States House of Representatives, representing the 6th Congressional District of Texas. He is Chairman of the Subcommittee on Energy & Air Quality of the House Energy & Commerce Committee. This subcommittee has jurisdiction over national energy policy; accordingly, Congressman Barton has played, and continues to play, a central role in enacting major new energy legislation. Congressman Barton is also a member of the House Science Committee, which has jurisdiction over all non-defense federal research and development. The Committee has at least partial jurisdiction over numerous federal agencies, including the National Aeronautics and Space

Administration, Department of Energy, Environmental Protection Agency, National Science Foundation, and Federal Aviation Administration. Congressman Barton is a member of the House Republican Steering Committee, which sets strategy for House Republicans, and Co-Chairman of the Congressional Privacy Caucus. Like Congressman DeLay, he also spends a substantial amount of his limited time in consultation with his constituents in the 6th District.

In the coming days and weeks, he will be working primarily on ensuring enactment of the energy bill before the end of the year. As one of the primary authors of the bill, he will be heavily engaged in ongoing negotiations with the Senate and the White House, requiring numerous meetings and telephone conferences. At the same time, he has many commitments to meet with constituents and interest groups in Texas and in Washington, D.C. For example, he is committed to meet with the Women's Focus Group and Hispanic Advisory Group, and on December 2, 2003 will chair a public hearing of the House Science Committee in Tyler, Texas. He also has various other official commitments over the next three weeks, all of which are contingent upon the House schedule.

ARGUMENT

I. MEMBERS OF CONGRESS MAY BE COMPELLED TO TESTIFY ONLY UNDER EXTRAORDINARY CIRCUMSTANCES.

In light of their extensive official responsibilities, the burden imposed on high government officials by involuntary non-party discovery is especially great. Courts therefore require proof of "extraordinary" or "exceptional" circumstances before ordering officials to

submit to discovery.[3] As one court explained, "[t]he reason for requiring exigency before allowing the testimony of high officials is obvious. High ranking government officials have greater duties and time constraints than other witnesses." *In re United States*, 985 F.2d at 512. Equally compelling are the palpable dangers inherent in subjecting officials of a coordinate branch to judicially compelled interrogation. *See United States v. Morgan*, 313 U.S. 409, 422 (1941) (admonishing lower court for having allowed deposition of Secretary of Agriculture and noting that "appropriate independence of each [branch] should be respected by the other").

Members of Congress plainly qualify as high government officials entitled to the protection of the exceptional circumstances rule. Courts have treated as "high government officials" even appointed inspectors general,[4] federal bank regulators,[5] members of a federal parole board,[6] and a regional administrator of the Occupational Safety and Health Administration.[7] Elected Members of Congress, who hold constitutional offices with duties delineated in Article I of the Constitution and whose legislative communications are expressly protected by the Speech and Debate Clause, operate at the very core of our constitutional system. Not surprisingly, those courts that have considered the question have consistently applied the exceptional circumstances standard to Members of Congress. *See Springfield Terminal Railway*

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[3] *Accord In re United States*, 197 F.3d 310, 313-14 (8th Cir. 1999) ("extraordinary circumstances"); *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993) (requiring "exigency" before allowing testimony of high officials); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) ("extraordinary circumstances"); *Kyle Eng'g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) (high officials "not normally subject to deposition"); *United States Bd. of Parole v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973).

[4] *In re Office of Inspector General*, 933 F.2d at 278.

[5] *In re Federal Deposit Insurance Corp.*, 58 F.3d 1055, 1060 (5th Cir. 1995).

[6] *United States Bd. of Parole v. Merhige*, 487 F.2d at 29.

[7] *Simplex Time Recorder Co.*, 766 F.2d at 586.

Co. v. United Transportation Union, Misc. No. 89-0073, 1989 WL 225031 (D.D.C. May 18, 1989) (granting motion for protective order against deposition of Ranking Minority Member of House Appropriations Committee); *Bardoff v. United States*, 628 A.2d 86, 90 (D.C. 1993) (affirming order quashing subpoenas of United States Senators); *Cano v. Davis*, No. CV 01-08477 (C.D. Cal. Mar. 28, 2002) (three-judge court's unpublished order dated March 28, 2003 granting motions to quash subpoenas of Members of Congress in California redistricting litigation) (attached hereto as Exhibit C).

The Fifth Circuit has held that a "strong showing [is] necessary for a finding of exceptional circumstances." *In re FDIC*, 58 F.3d at 1061. Specifically, the party seeking to compel testimony by the high government official must make a strong showing that the testimony is not available from any other source. *Id.* at 1062 ("We think it will be the rarest of cases . . . in which exceptional circumstances can be shown where the testimony is available from an alternative witness.").

Moreover, the testimony sought must be more than merely relevant, or reasonably calculated to lead to the discovery of admissible evidence, as is normally required by Federal Rule of Civil Procedure 26(b)(1). Discovery from non-party, high government officials must be "*essential*" to the case. *See In re United States*, 197 F.3d at 314. In short, the normally liberal standards allowing broad discovery in civil cases do not apply when discovery is directed at non-party, high government officials.

Remarkably, just last year, Jenner & Block, one of the firms involved in issuing the two subpoenas at issue here, successfully urged application of this "extraordinary circumstances and essential evidence" standard, before a three-judge court convened to consider the California redistricting plan, in obtaining an order to quash a subpoena issued to

Congressman Brad Sherman. Jenner & Block wrote that "courts routinely have required a showing of '*extraordinary circumstances*' before forcing [high-ranking government officials] to comply with non-party subpoenas. That standard requires, among other things, that the government official possess *unique personal knowledge that is essential to the plaintiff's case* and cannot be obtained from any other source." Mem. of Law in Support of Motion To Quash Third Party Subpoenas to Congressman Brad Sherman, in *Cano v. Davis*, Civ. No. 01-08477 MMM (RCx) (Three Judge Court) (filed March 11, 2002) (emphasis added). As shown, that Court granted an order quashing the subpoena to Congressman Sherman and also quashed subpoenas to two other Congressmen. *See Cano v. Davis*, Civ. No. 01-08477 (order dated March 28, 2002, attached hereto as Exhibit C).

II. NO EXTRAORDINARY CIRCUMSTANCES ARE PRESENT HERE.

A. Discovery from Congressmen DeLay and Barton Is Not Essential to the Case.

To compel the testimony of Congressmen DeLay and Barton in this case, plaintiffs must make a "strong showing" that their testimony is both relevant and "essential" to the case. It is not enough for plaintiffs to claim that Congressmen DeLay and Barton were interested in the redistricting process in their home state. Nor is it sufficient for plaintiffs to assert that Congressmen DeLay and Barton communicated with those involved in the process. It would be the rare Member of Congress who did not keep abreast of the redistricting process in his or her home state. Yet, as previously stated, never before has a Member of Congress been compelled to give testimony in a redistricting case.

As in other redistricting cases, this Court's principal focus is on the *effects* of redistricting legislation, not the *intent* of the State Legislature, regardless of whether that intent was or was not influenced by Members of Congress. Plaintiffs' claims under Section 2 of the Voting Rights Act turn on the effects of the redistricting plan enacted by the Texas Legislature,

not the Legislature's intent in adopting that plan. *See Shaw v. Reno*, 509 U.S. 630, 641 (1995) ("In 1982, [Congress] amended §2 of the Voting Rights Act to prohibit legislation that *results* in the dilution of a minority group's voting strength, regardless of the legislature's intent."); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1230 (C.D. Cal. 2002) ("To establish a traditional claim under section 2, plaintiffs need prove only . . . the challenged district has the 'effect' of diluting the electoral power of minority voters. *Intent is not an element.*" (emphasis added)).

Moreover, while plaintiffs have alleged partisan gerrymandering, that claim does not make the testimony of Members of Congress relevant, let alone essential. In the first place, the relevant intent is that of the Members of the Texas Legislature – who actually voted to enact the legislation – not that of Members of the United States Congress, and the Texas Legislators can best speak to their own intent.

In the second place, the element of intent is not the principal focus of a partisan gerrymandering claim. In *Davis v. Bandemer*, 478 U.S. 109 (1986), a plurality of the Supreme Court specified the standard to be applied to an equal protection challenge to a redistricting map based on partisan gerrymandering: A plaintiff must "prove both intentional discrimination against an identifiable political group and an *actual discriminatory effect* on that group." *Davis*, 478 U.S. at 127 (emphasis added). The plurality opinion in *Davis* also stated that "as long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id* at 128. Accordingly, it is not the intent element of a partisan gerrymandering claim that is the real battleground. Instead, courts focus on the alleged discriminatory effect. Plaintiffs must prove both an actual or projected history of disproportionate election results and that the "electoral system is arranged in a manner that will consistently degrade a voter's, or group of voters', influence on the political

process as a whole." *Vieth v. Pennsylvania*, 188 F. Supp.2d 532, 543 (M.D. Pa. 2002) (*quoting Davis*, 478 U.S. at 132). Courts rigorously apply the requirement of discriminatory effect to deny claims whenever the plaintiff does not allege and prove that he or she will be "completely shut out of the political process." *See id.* at 544. The nonparty discovery sought here has no relationship at all to plaintiffs' need to show "actual discriminatory effect."

B. Congressmen DeLay and Barton Are Not the Only Available Sources of Testimony.

It is far from clear what testimony plaintiffs seek to elicit from Congressman DeLay. According to J. Gerald Hebert, Esq., who issued the subpoenas on behalf of his clients, the subject of inquiry is Congressmen DeLay's and Barton's "roles in, and communications regarding, the Texas redistricting plan." *See* Exhibit D (November 24, 2003 letter from J. Gerald Hebert to Bobby R. Burchfield and J.D. Pauerstein). Plaintiffs allege in their Complaint, however, that "national Republican Party figures, including but not limited to Tom DeLay . . . devised a political strategy to pressure local Republican members of the State Legislatures of Colorado, Pennsylvania, and Texas" to "enact new partisan congressional districting statutes." *Session v. Perry*, No. 2:03-CV-354, Complaint at 6. The subpoenas at issue seek "any and all documents 1) the deponent either sent or received from any member of the Texas Legislature from January 1, 2003 to November 17, 2003, which contained any references to or were the subject of, congressional redistricting in Texas, and 2) that deponent [DeLay or Barton] either sent or received from Jim Ellis and/or Craig Murphy regarding Texas redistricting."

Even if plaintiffs' allegation had a basis in fact, it is clear on its face that Congressmen DeLay and Barton would not be the only witnesses able to testify to these matters. Just as it takes two hands to clap and two dancers to tango, for every "communication" there must be both a speaker and a listener, or a writer and a reader. As for the first category of

requested documents, any member(s) of the Texas Legislature who initiated or received any such communications are at least equally knowledgeable, and likely more so since only they can testify to the effect of the communication on their votes. As for the second set – even assuming such communications had any actual effect on the redistricting process – Messrs. Ellis and/or Murphy are at least equally knowledgeable. (We note that plaintiffs have also subpoenaed Mr. Ellis, confirming their awareness of his duplicative knowledge.) Yet plaintiffs have subpoenaed the House Majority Leader, and another senior Member, while the House is in session, as their first rather than their last resort. Plaintiffs make no allegations whatsoever regarding Congressman Barton, and so their reasons for seeking his testimony are difficult to fathom.

C. Appropriate Regard For The Rules Of The House Of Representatives Also Weighs In Favor of Quashing The Subpoenas.

The Rules of the U.S. House of Representatives directly address compliance with subpoenas. Those rules, which were promulgated by the House to ensure the integrity of its official operations, are binding upon Congressmen DeLay and Barton, as they are for all other Members of the House. *Cf. Yellin v. United States*, 374 U.S. 109, 114 (1963) (holding that House Rules bind legislative committees).

House Rule VIII, titled "Responses to Subpoenas," requires that prior to complying with a subpoena "directing appearance as a witness in relation to the official functions of the House or for the production and disclosure of any documents relating to the official functions of the House," a Member must determine that the subpoena is "material and relevant and is consistent with the privilege and rights of the House." *See* Rule VIII of the Rules of the House of Representatives, 108th Cong. (2003). This rule has the force of law, and a court must defer enforcement of a subpoena until the Member has had an adequate opportunity to make the

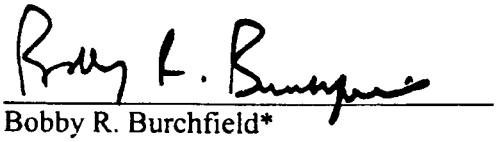
required determination. *See Shape of Things to Come, Inc. v. County of Kane*, 588 F. Supp. 1192, 1194 (N.D. Ill. 1984).

Although plaintiffs' counsel disclaims any intention to inquire about the deponents' official duties, *see* Exhibit D, this assurance is not comforting. The relationship between the House Majority Leader's official responsibilities and his concern for appropriate and fair Congressional redistricting is so close that separation will prove difficult if not impossible, both in questioning and in objecting pursuant to the Speech and Debate Clause. As but one example, it is apparent that the subpoenas' effective command that Congressmen DeLay and Barton produce computer hard drives will have the effect (if not the intent) of disrupting their ability to function in their elected capacities, and will enable plaintiffs to undertake a politically-motivated inspection of even the least relevant aspects of these Members' official activities. Even if plaintiffs succeed in avoiding direct questioning about the broad range of official duties performed by Congressmen DeLay and Barton, they have further failed to explain how these inquiries bear any legal relationship to their attack on the redistricting plan.

CONCLUSION

For the foregoing reasons, Congressmen DeLay and Barton respectfully urge the Court to quash the subpoenas.

Respectfully submitted,



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November 25, 2003

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the

United States District Court

DISTRICT OF COLUMBIA

WALTER SESSION, ET AL

V.

RICK PERRY, ET AL

SUBPOENA IN A CIVIL CASE

CASE NUMBER:[1] 2:03-CV-354
United States District Court for the
Eastern District of Texas
Marshall Division

To: TOM DeLAY
242 Cannon House Office Building
Washington, DC 20515

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Jenner & Block 601 13th St., NW, 12th Floor, Washington, DC	Nov. 25, 2003 at 10:00 a.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): See Exhibit A, Attached

PLACE	DATE AND TIME
Jenner & Block 601 13th St., NW, 12th Floor, Washington, DC	Nov. 25, 2003 at 10:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
J. Gerald Hebert, Attorney for Plaintiff-Intervenor	11/19/03

ISSUING OFFICER'S NAME, ADDRESS, AND PHONE NUMBER
J. Gerald Hebert, 5019 Waple Lane, Alexandria, VA 22304 (703) 567-5873

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

[1] If action is pending in district other than district of issuance, state district under case number.

PROOF OF SERVICE

DATE	PLACE
SERVED	
SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on

Date

Signature of Server

Address of Server

RULE 45, Federal Rules of Civil Procedure, Part C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. if objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. if objection has been made, the party Serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance:

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies. or

(vi) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an un-retained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena. quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that Cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) when information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT "A" TO DEPOSITION SUBPOENA

FOR TOM DeLAY

Deponent DeLay shall bring with him any and all documents 1) that deponent either sent or received from any member of the Texas Legislature from January 1, 2003 to November 17, 2003, which contained any references to or were the subject of, congressional redistricting in Texas and 2) that deponent DeLay either sent or received from Jim Ellis and/or Craig Murphy regarding Texas redistricting . The word "document" includes any written, printed, typed, recorded or graphic matter, however produced or reproduced, and includes, but is not limited to, published materials, reports, correspondence, records, memoranda, notices, notes, marginal notations, and email messages sent or received. If any emails were written or received during this period that referred to or were the subject of congressional redistricting, but such emails have been deleted, provide a copy of the hard drive of the computer(s) on which these emails were written.

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the

United States District Court

DISTRICT OF COLUMBIA

WALTER SESSION, ET AL

V.

RICK PERRY, ET AL

SUBPOENA IN A CIVIL CASE

CASE NUMBER:[1] 2:03-CV-354
United States District Court for the
Eastern District of Texas
Marshall Division

JOE BARTON
To: 2109 Rayburn House Office Building
Washington, DC 20515

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Jenner & Block, 601 13th St/, NW, 12th Floor, Washington, DC	November 26, 2003 at 10:00

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects) See Exhibit A, Attached

PLACE	DATE AND TIME
Jenner & Block 601 13th St., NW, 12th Floor, Washington, DC	November 26, 2003 at 10:00

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
J. Gerald Hebert, Attorney for Plaintiff Intervenors	11/19/03

ISSUING OFFICER'S NAME, ADDRESS, AND PHONE NUMBER
J. Gerald Hebert, 5019 Waple Lane, Alexandria, VA 22304 (703) 567-5873

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

[1] If action is pending in district other than district of issuance, state district under case number.

AO 88 (Rev. 1/94) Subpoena in a Civil Case

PROOF OF SERVICE

DATE	PLACE
SERVED	
SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
Date

_____
Signature of Server

_____
Address of Server

RULE 45, Federal Rules of Civil Procedure, Part C & D:

(c) PROTECTION OF PERSON$ SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. if objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. if objection has been made, the party Serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an un-retained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that Cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) when information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT "A" TO DEPOSITION SUBPOENA

FOR JOE BARTON

Deponent Barton shall bring with him any and all documents 1) that deponent either sent or received from any member of the Texas Legislature from January 1, 2003 to November 17, 2003, which contained any references to or were the subject of, congressional redistricting in Texas and 2) that deponent Barton either sent or received from Jim Ellis, and/or Craig Murphy regarding Texas redistricting. The word "document" includes any written, printed, typed, recorded or graphic matter, however produced or reproduced, and includes, but is not limited to, published materials, reports, correspondence, records, memoranda, notices, notes, marginal notations, and email messages sent or received. If any emails were written or received during this period that referred to or were the subject of congressional redistricting, but such emails have been deleted, provide a copy of the hard drive of the computer(s) on which these emails were written.

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

BOBBY R. BURCHFIELD
PARTNER
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BBURCHFIELD@COV.COM

November 22, 2003

BY FAX ONLY

J. Gerald Hebert, Esq. (703/567-5876)
5019 Waple Lane
Alexandria, VA 22304

Jonathan Ross, Esq. (713-654-3399)
Susman Godfrey L.L.P.
1000 Louisiana, Suite 5100
Houston, TX 77002-5096

Re: ***Walter Session, et al. v. Rick Perry, et al.*****, No. 2:03-CV-354 (E.D. TX)**

Dear Gentlemen:

I have been engaged to represent Congressman Tom Delay and I write in reference to the subpoenas served November 19 on the Honorable Tom DeLay, U.S. Representative for the 22nd Congressional District of Texas, and the Honorable Joe Barton, U.S. Representative for the 6th Congressional District of Texas, in the above-referenced matter. Congressman Barton has retained the counsel of J.D. Pauerstein, who concurs with this letter. These subpoenas purport to require Congressmen DeLay and Barton to appear for depositions in Washington, D.C. on November 25 and November 26, 2003 respectively, and to bring with them certain documents related to congressional redistricting in Texas.

We have agreed to a procedure by which any motions to quash will be filed with the three-judge panel in Texas on Tuesday, November 25 and the depositions, if any are ordered, will take place the week of December 1 in Houston (unless the House is then in session). In order for the Representatives to fulfill their obligations under the Rules of the House of Representatives, as well as to determine whether this case presents the type of extraordinary circumstances that could justify deposing Members of Congress, they need to know what information you are seeking from them, whether the information relates to their official duties, why this information is relevant and material to the above-referenced litigation, and why the information could not be obtained from other sources

As an initial matter, if you are seeking information relating to the Members' official duties (including seeking documents from their congressional offices), Rule VIII of the Rules of the House of Representatives (copy attached) requires that they make certain determinations,

including whether the subpoenas are "material and relevant," prior to complying. This rule has the force of law, and prohibits enforcement of a subpoena when a Member has not made the required determination. *See Shape of Things to Come, Inc. v. County of Kane*, 588 F. Supp. 1192, 1194 (N.D. Ill. 1984).

Moreover, regardless of the type of information sought, numerous federal cases have held that high-ranking government officials may be called as witnesses or deposed only in exceptional or extraordinary circumstances.[1] Just last year a three-judge redistricting panel in *Cano, et al. v. Davis, et. al*, No. CV-01-80477 (C.D. Ca.), applied these principles to quash subpoenas to three Democratic Members of the California congressional delegation. In that case, the Bipartisan Legal Advisory Group of the House – the Speaker, the Majority and Minority Leaders, and the Majority and Minority Whips – filed an amicus brief in support of the motions to quash. The brief emphasized the special reasons that involuntary depositions of Members in redistricting cases should be disfavored:

> Given [the] inherent congressional interest in the redistricting process, the prospect that parties to redistricting litigation could compel Representatives to be deposed threatens to impose enormous burdens on Members of Congress for engaging in legitimate activity. Parties to redistricting litigation will inevitably attempt to pry into politically sensitive discussions between Representatives and state legislators, other Members of Congress, constituents, party representatives and/or political consultants. . . .
>
> Worse, given the inherently political nature of redistricting litigation, plaintiffs unhappy with the outcome of the state legislative process may also seek to question Representatives to harass, embarrass or damage political opponents or other perceived beneficiaries of the redistricting legislation, or to obtain publicity for a political agenda. . . .

Memorandum of the Bipartisan Legal Advisory Group of the United States House of Representatives as Amicus Curiae in Support of Motions to Quash Subpoenas filed by U.S. Representatives Berman, Filner and Sherman, filed in *Cano v. Davis* (Mar. 12, 2002).

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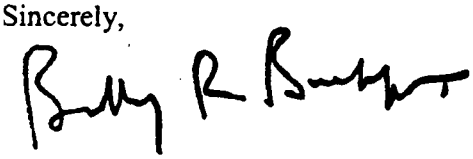
[1] *See, e.g., Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (affirming ALJ's refusal to permit top Labor Department officials to be called as witnesses); *Peoples v. U.S. Dep't of Agriculture*, 427 F.2d 561, 567 (D.C. Cir. 1970) (suggesting that Secretary of Agriculture may not be deposed); *Alexander v. FBI*, 186 F.R.D. 1, 4-5 (D.D.C. 1998) (issuing protective order to prevent depositions of officials in Executive Office of the President). *See also Bardoff v. U.S.*, 628 A.2d 86, 90 (D.C. 1993) (affirming trial court order quashing subpoenas to Senators and Senate Committee counsel on ground, among others, that defendants "failed to proffer any reason why others present who did not hold such high offices could not provide the testimony.").

We request that you provide us with a written explanation of (1) the intended scope of the questioning, (2) whether you seek any information, documentary or testimonial, related to the Member's official duties (3) the purported relevance of the information you seek to the issues in the case, and (4) why this case presents the type of extraordinary circumstances that would justify deposing Members of Congress. Please provide the information by telecopier (202) 778-5350 and email BBurchfield@cov.com by noon on Monday November 24th.

Sincerely,



Bobby R. Burchfield

cc: J.D. Pauerstein

(3) A record for which a time, schedule, or condition for availability is specified by order of the House shall be made available in accordance with that order. Except as otherwise provided by order of the House, a record of a committee for which a time, schedule, or condition for availability is specified by order of the committee (entered during the Congress in which the record is made or acquired by the committee) shall be made available in accordance with the order of the committee.

(4) A record (other than a record referred to in subparagraph (1), (2), or (3)) shall be made available if it has been in existence for 30 years.

4. (a) A record may not be made available for public use under clause 3 if the Clerk determines that such availability would be detrimental to the public interest or inconsistent with the rights and privileges of the House. The Clerk shall notify in writing the chairman and ranking minority member of the Committee on House Administration of any such determination.

(b) A determination of the Clerk under paragraph (a) is subject to later orders of the House and, in the case of a record of a committee, later orders of the committee.

5. (a) This rule does not supersede rule VIII or clause 11 of rule X and does not authorize the public disclosure of any record if such disclosure is prohibited by law or executive order of the President.

(b) The Committee on House Administration may prescribe guidelines and regulations governing the applicability and implementation of this rule.

(c) A committee may withdraw from the National Archives and Records Administration any record of the committee delivered to the Archivist under this rule. Such a withdrawal shall be on a temporary basis and for official use of the committee.

Definition of record

6. In this rule the term "record" means any official, permanent record of the House (other than a record of an individual Member, Delegate, or Resident Commissioner), including—

(a) with respect to a committee, an official, permanent record of the committee (including any record of a legislative, oversight, or other activity of such committee or a subcommittee thereof); and

(b) with respect to an officer of the House elected under rule II, an official, permanent record made or acquired in the course of the duties of such officer.

Withdrawal of papers

7. A memorial or other paper presented to the House may not be withdrawn from its files without its leave. If withdrawn certified copies thereof shall be left in the Office of the Clerk. When an act passes for the settlement of a claim, the Clerk may transmit to the officer charged with the settlement thereof the papers on file in his office relating to such claim. The Clerk may lend temporarily to an officer or bureau of the executive departments any papers on file in his office relating to any matter pending before such officer or bureau, taking proper receipt therefor.

RULE VIII

RESPONSE TO SUBPOENAS

1. When a Member, Delegate, Resident Commissioner, officer, or employee of the House is properly served with a judicial or administrative subpoena or judicial order directing appearance as a witness relating to the official functions of the House or for the production or disclosure of any document relating to the official functions of the House, such Member, Delegate, Resident Commissioner, officer, or employee shall comply, consistently with the privileges and rights of the House, with the judicial or administrative subpoena or judicial order as hereinafter provided, unless otherwise determined under this rule.

2. Upon receipt of a properly served judicial or administrative subpoena or judicial order described in clause 1, a Member, Delegate, Resident Commissioner, officer, or employee of the House shall promptly notify the Speaker of its receipt in writing. Such notification shall promptly be laid before the House by the Speaker. During a period of recess or adjournment of longer than three days, notification to the House is not required until the reconvening of the House, when the notification shall promptly be laid before the House by the Speaker.

3. Once notification has been laid before the House, the Member, Delegate, Resident Commissioner, officer, or employee of the House shall determine whether the issuance of the judicial or administrative subpoena or judicial order described in clause 1 is a proper exercise of jurisdiction by the court, is material and relevant, and is consistent with the privileges and rights of the House. Such Member, Delegate, Resident Commissioner, officer, or employee shall notify the Speaker before seeking judicial determination of these matters.

4. Upon determination whether a judicial or administrative subpoena or judicial order described in clause 1 is a proper exercise of jurisdiction by the court, is material and relevant, and is consistent with the privileges and rights of the House, the Member, Delegate, Resident Commissioner, officer, or employee of the House shall immediately notify the Speaker of the determination in writing.

5. The Speaker shall inform the House of a determination whether a judicial or administrative subpoena or judicial order described in clause 1 is a proper exercise of jurisdiction by the court, is material and relevant, and is consistent with the privileges and rights of the House. In so informing the House, the Speaker shall generally describe the records or information sought. During a period of recess or adjournment of longer than three days, such notification is not required until the reconvening of the House, when the notification shall promptly be laid before the House by the Speaker.

6. (a) Except as specified in paragraph (b) or otherwise ordered by the House, upon notification to the House that a judicial or administrative subpoena or judicial order described in clause 1 is a proper exercise of jurisdiction by the court, is material and relevant, and is consistent with the privileges and rights of the House, the Member, Delegate, Resident Commissioner, officer, or employee of the House shall comply with the judicial or administrative subpoena or judicial order by supplying certified copies.

(b) Under no circumstances may minutes or transcripts of executive sessions, or evidence of witnesses in respect thereto, be disclosed or copied. During a period of recess or adjournment of longer than three days, the Speaker may authorize compliance or take such other action as he considers appropriate under the circumstances. Upon the reconvening of the House, all matters that transpired under this clause shall promptly be laid before the House by the Speaker.

7. A copy of this rule shall be transmitted by the Clerk to the court when a judicial or administrative subpoena or judicial order described in clause 1 is issued and served on a Member, Delegate, Resident Commissioner, officer, or employee of the House.

8. Nothing in this rule shall be construed to deprive, condition, or waive the constitutional or legal privileges or rights applicable or available at any time to a Member, Delegate, Resident Commissioner, officer, or employee of the House, or of the House itself, or the right of such Member, Delegate, Resident Commissioner, officer, or employee, or of the House itself, to assert such privileges or rights before a court in the United States.

RULE IX

QUESTIONS OF PRIVILEGE

1. Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; and second, those affecting the rights, reputation, and conduct of Members, Delegates, or the Resident Commissioner, individually, in their representative capacity only.

2. (a)(1) A resolution reported as a question of the privileges of the House, or offered from the floor by the Majority Leader or the Minority Leader as a question of the privileges of the House, or offered as privileged under clause 1, section 7, article I of the Constitution, shall have precedence of all other questions except motions to adjourn. A resolution offered from the floor by a Member, Delegate, or Resident Commissioner other than the Majority Leader or the Minority Leader as a question of the privileges of the House

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

P SEND

CIVIL MINUTES - GENERAL

Case No.: CV 01-08477 MMM (RCx) Date: March 28, 2002

Title: *Cano, et al. v. Davis, et al.*

DOCKET ENTRY

PRESENT:

HONORABLE STEPHEN REINHARDT, UNITED STATES CIRCUIT JUDGE;
HONORABLE CHRISTINA SNYDER, UNITED STATES DISTRICT JUDGE;
HONORABLE MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE

Anel Huerta	**N/A**
Deputy Clerk	**Court Reporter**
Attorneys Present for Plaintiff(s):	**Attorneys Present for Defendant(s):**
None	None

PROCEEDINGS: Order Granting Motions To Quash Subpoenas Ad Testificandum And Duces Tecum Served On Congressmen Berman, Filner, And Sherman

Pursuant to the stipulation of counsel, Local Rule 7-15 and Rule 78 of the Federal Rules of Civil Procedure, the court vacated the March 26, 2002 hearing on the motions of Congress Members Howard Berman, Brad Sherman and Bob Filner to quash the subpoenas ad testificandum and duces tecum served on them by plaintiffs, and found the matter suitable for decision without oral argument. Having considered the briefs submitted by counsel, the court grants the motions as set forth below.

On February 13, 2002, plaintiffs served a staff member in Congress Member Sherman's Woodland Hills office with subpoenas compelling him to appear for deposition and produce documents.[1] The subpoena ad testificandum noticed Sherman's deposition in Los Angeles on March 14, 2002, when Sherman was scheduled to be in Washington D.C.[2] The subpoena duces tecum required production by Sherman, his agents and staff of a broad range of documents

[1]See Memorandum of Law In Support of motion to Quash Third Party Subpoenas to Congressman Brad Sherman ("Sherman Mot.") at 3:16-19.

[2]See *id.* at 4:34; Ex. A.

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regarding the 2000-2001 redistricting process.[3] On February 14, 2002, plaintiffs served subpoenas on Congress Member Berman's District Office in Mission Hills. While plaintiffs notified the parties that they planned to serve subpoenas on Congress Member Filner, such service has not been effected to date.[4]

"Exceptional circumstances" are necessary to compel discovery from high ranking government officials. See *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993) (per curiam) (holding that high ranking government officials ". . .'should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.'. . . [They] have greater duties and time constraints than other witnesses . . . ," quoting *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)). See also *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (affirming "a settled rule . . . that 'exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted,'" quoting *In re Officer of Inspector General*, 933 F.2d 276, 278 (5th Cir. 1991)); *Kyle Engineering Company v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) ("Heads of government agencies are not normally subject to deposition").

Courts have articulated a variety of factors relevant in assessing whether exceptional circumstances are present. Among the factors courts examine is whether the high ranking official "possess information essential to [the] case which is not obtainable from another source . . . ." *In re United States (Reno)*, 197 F.3d 310, 314 (8th Cir. 1999) (citing *In re FDIC*, *supra*, 58 F.3d at 1062). The Eighth Circuit, in fact, has gone so far as to state that the party seeking discovery must "show an entitlement to the relief sought in the case." *In re United States (Reno)*, *supra*, 197 F.3d at 314. See also *In re FDIC*, *supra*, 58 F.3d at 1062 (denying defendants the right to depose high ranking officials of the FDIC after the agency brought a declaratory relief action because there was not "a strong showing of bad faith or improper behavior" in the record, "notwithstanding Pacific Union's allegations of misconduct (including conspiracy and cover-up) and assertions of gross abuse of power by government agencies and officials").

Plaintiffs assert that the Congress Members possess evidence relevant to the California Legislature's intent in enacting the redistricting plan, and that such evidence is relevant both to their Fourteenth Amendment and Voting Rights Act claims. It is clear, however, that with respect to both species of claim, plaintiffs must, in addition to proving intent, also prove that the Legislature's redistricting plan had a discriminatory effect on Latino voters. See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) ("Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter"); *Davis*

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[3]See *id.* at 4:5-8; Ex. B.

[4]See Memorandum in Support of Motion of Congressmen Filner and Berman to Quash Subpoenas ("Berman/Filner Mot.") at 5:14-24. Neither the Berman nor the Sherman subpoena was properly served as required by Rule 45 of the Federal Rules of Civil Procedure.

v. Bandemer, 478 U.S. 109, 127 (1986) (to prevail on Fourteenth Amendment vote dilution claim, plaintiffs must prove intentional discrimination against an identifiable political group; and an actual discriminatory effect on that group); *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) ("Even where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result").

The Senate defendants have filed motions for summary judgment asserting that plaintiffs cannot raise a triable issue of fact regarding the discriminatory effect of the redistricting plan in the challenged State Senate and Congressional districts. Defendants' motions also challenge, *inter alia*, the legal merit of plaintiffs' claim under *Shaw v. Reno*, 509 U.S. 630 (1993). The Congress Members argue that, until these motions are decided, and it is determined both that plaintiffs have adduced sufficient evidence of discriminatory effect to move beyond summary judgment, and that plaintiffs' *Shaw* claim is legally tenable,[5] they cannot demonstrate that the Congress Members' deposition testimony is "essential" to their case. They argue further that plaintiffs cannot make a sufficient showing of entitlement to relief on the merits to warrant compelling the discovery under the "exceptional circumstances" standard applicable to high ranking officials.

The Supreme Court has cautioned that district courts adjudicating legislative redistricting claims must be mindful of "the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at various stages of litigation and determining whether to permit discovery or trial to proceed." *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995). Coupled with the "exceptional circumstances" standard applicable to depositions and discovery requests served on high ranking government officials, *Miller* counsels that the present subpoenas be quashed until such time following disposition of defendants' summary judgment motions as the court determines that discovery regarding issues of intent is appropriate.[6]

Initials of Deputy Clerk

cc: **Counsel of record (or parties)**

---

[5]Defendants have raised substantial questions as to whether the challenged districts are of the type that can be the subject of a successful *Shaw* claim. The court believes it prudent to resolve that legal issue before addressing the factual merits of the claim or authorizing discovery relevant to it.

[6]It is true, as plaintiffs note, that the court, in its order denying plaintiffs' application for temporary restraining order, stated that it believed plaintiffs presented sufficiently serious questions to make the case a fair ground for litigation. The court also stated, however, that it could not conclude on the limited record before it that plaintiffs would probably succeed on the merits of their claims. It is precisely the limited nature of the temporary restraining order record that leads the court to conclude that any assessment as to whether the Congress Members' testimony is "essential" should await resolution of the pending summary judgment motions.

J. Gerald Hebert
Attorney at Law
J. Gerald Hebert, P.C.
5019 Waple Lane · Alexandria,VA 22304 · (703) 567-5873 (office) ·(703) 567-5876 (fax)

November 24, 2003

Via fax transmission
Jonathan D. Pauerstein, Esq.
Loeffler Jonas & Tuggey LLP
755 East Mulberry
Suite 200
San Antonio, TX 78212

Bobby R. Burchfield, Esq.
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

Re: Walter Session, et al. v. Rick Perry, et al., No. 2:03-CV-354 (E.D. TX)

Gentlemen:

I am writing in response to your letters dated November 22, 2003 in which each of you pose several questions regarding the deposition subpoenas served on your clients. Among other things, you raise questions regarding the applicability of House Rule VIII and the duties your clients faced under it. I note that Rule VIII sets forth a process for Members to notify the House regarding subpoenas aimed at "the official functions of the House." We take no position on Members' obligations under the internal rules of the House, but this Rule does not address the legal or factual basis for the issuance of the subpoenas, or place into question their enforceability in this case.

For your information, the subject matter and scope of the deposition will be your clients' roles in, and communications regarding, the Texas redistricting plan. Each of your clients has been reported and quoted as being centrally involved in the development and promotion of the current Texas redistricting effort that is the subject of the current litigation. It is on this topic that my clients seek to depose the Congressmen. Similarly, you have inquired about the relevance of the testimony being sought. Insofar as the pending litigation relates directly to the intent behind and the circumstances by which the current plan was developed, your clients' testimony would be both relevant and necessary. In fact, during the course of the litigation, Defendants in this matter have repeatedly cited the Congressmen's role.

Finally, you assert that your clients' testimony should only be sought and obtained in "extraordinary circumstances." The proper legal standard to apply in this case will ultimately be ruled upon by the Court after briefing by both sides. Nevertheless, we believe that on the well-established public record, the facts when considered in the light of the proper standard fully support the need for your clients' testimony.

If you have any further question, please do not hesitate to contact me directly.

Very truly yours,

J. Gerald Hebert

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, ET AL.,	)	
Plaintiffs,	)	
v.	)	**No. 2:03-CV-354**
	)	**(Higginbotham, Ward, Rosenthal)**
RICK PERRY, ET AL.,	)	
Defendants.	)	

[PROPOSED] ORDER

After consideration of the Motion of Congressman Tom DeLay and Congressman Joe Barton To Quash Subpoenas Ad Testificandum and Duces Tecum, and the Memoranda in Support thereof, and in Opposition thereto,

It is hereby Ordered, that the Motion be and is hereby GRANTED, and it is

FURTHER ORDERED, that the Subpoenas to Congressman Tom DeLay and Congressman Joe Barton are hereby quashed and declared of no force and effect in any respect.

_____
UNITED STATES JUDGE

Dated: _____, 2003

DC: 1111998-1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, ET AL.,	)	
Plaintiffs,	)	
v.	)	**No. 2:03-CV-354**
	)	**(Higginbotham, Ward, Rosenthal)**
RICK PERRY, ET AL.,	)	
Defendants.	)	

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Congressmen DeLay and Barton conferred with opposing counsel in a good faith attempt to resolve the matter of the subpoenas served by opposing counsel on Congressmen DeLay and Barton. Counsel were unable to resolve their differences, and opposing counsel opposes the Motion to Quash Subpoenas of Congressmen DeLay and Barton.

Bobby R. Burchfield*
Attorney-in-Charge
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000
(202) 778-5350
Attorney for Congressman DeLay
**Pro Hac Vice Motion Pending*

November 25, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2003, I have caused the foregoing Motion to Quash Subpoenas of Congressmen Tom DeLay and Joe Barton to be sent by facsimile to the following:

J. Gerald Hebert, Esq.
5019 Waple Lane
Alexandria, VA 22304
Fax: (703) 567-5876

Jonathan Ross, Esq.
Susman Godfrey LLP
1000 Louisiana, Suite 5100
Houston, TX 77002-5096
Fax: (713) 654-3399

Hon. Greg Abbott, Esq.
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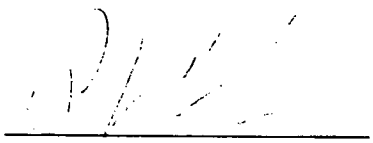

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November 25, 2003

BY FACSIMILE

Clerk of the Court
U.S. District Court for the
Eastern District of Texas
100 East Houston, Room 125
Marshall, TX 75670
Fax: (903) 938-2651

Re: *Session v. Perry*, No. 2:03-CV-354 (Higginbotham, Ward, Rosenthal)

Dear Clerk:

Please find attached for filing in the above-captioned matter the Motion for Admission Pro Hac Vice of Bobby R. Burchfield. The original and one copy, along with a check for the filing fee of $25, will be sent to you today by first class mail. If you have any questions, I may be reached at 202-662-5503.

Thank you for your assistance.

Sincerely,

Robert K. Kelner

Attachment

Bobby R. Burchfield (D.C. Bar No. 289124)
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 662-5350

Attorneys for Congressman Tom R. DeLay

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, ET AL.,	)	
Plaintiffs,	)	
v.	)	**No. 2:03-CV-354**
RICK PERRY, ET AL.,	)	
Defendants.	)	

APPLICATION OF ATTORNEY FOR ADMISSION TO PRACTICE PRO HAC VICE PURSUANT TO LOCAL RULE AT-1(d)

NOTICE: Please submit the $25 fee with application

1. This application is being made for the following: Case # 2:03-CV-354
Style: Civil

2. Applicant is representing the following party/ies: Congressman Tom Delay

3. Applicant was admitted to practice in District of Columbia (state) on March 21, 1980 (date).

4. Applicant is in good standing and is otherwise eligible to practice law before this court.

5. Applicant is not currently suspended or disbarred in any other court.

6. There are no pending grievances or criminal matters pending against the applicant.

7. Applicant has been admitted to practice in the following courts: D.C. Court of Appeals, Supreme Court, U.S. Court of Appeals for D.C., 3rd, 5th, 6th, and 9th Circuits, District Courts of D.C. and Colorado

8. Applicant has read and will comply with the Local Rules of the Eastern District of Texas, including Rule AT-3, the AStandards of Practice to be Observed by Attorneys.@

9. Applicant has included the requisite $25 fee (see Local Rule AT-1(d)).

10. Applicant understands that he/she is being admitted for the limited purpose of appearing in the case specified above only.

Application Oath:

I, Bobby R. Burchfield do solemnly swear (or affirm) that the above information is true; that I will discharge the duties of attorney and counselor of this court faithfully; that I will demean myself uprightly under the law and the highest ethics of our profession; and that I will support and defend the Constitution of the United States.

Nov. 25, 2003 _____
Date

Bobby R. Burchfield
Signature

Name (please print)	Bobby R. Burchfield
State Bar Number	D.C. Bar No. 289124
Firm Name:	Covington & Burling
Address/P.O. Box:	1201 Pennsylvania Avenue, NW
City/State/Zip: _	Washington, DC 20004
Telephone #:	202-662-5350
Fax #:	202-778-5350

Applicant is authorized to enter an appearance as counsel for the party/parties listed above. This application has been approved for the court this ___ day of _____, 20___.

David J. Maland, Clerk
U.S. District Court, Eastern District of Texas

By _____
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2003, I have caused the foregoing Application for Admission Pro Hac Vice of Bobby R. Burchfield to be sent by facsimile to the following:

J. Gerald Hebert, Esq.
5019 Waple Lane
Alexandria, VA 22304
Fax: (703) 567-5876

Jonathan Ross, Esq.
Susman Godfrey LLP
1000 Louisiana, Suite 5100
Houston, TX 77002-5096
Fax: (713) 654-3399

Hon. Greg Abbott, Esq.
Attorney General of the State of Texas
P.O. Box 12548
Austin, TX 78711
Fax: (512) 463-2063

Robert K. Kelner

DC: 1112434-1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

03 DEC -1 PM 1:29

BY

WALTER SESSION, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO. 2:03-CV-354
	§	Consolidated
RICK PERRY, *et al.*,	§	
	§	
Defendants.	§	

ORDER

#82

Congressmen DeLay and Barton move to quash subpoenas requiring them to testify by deposition and to produce a broad array of documents and information. Extensive briefs were submitted in support of, and in opposition to, the motion to quash. This court heard oral argument from counsel in a telephonically-conducted hearing. The motion is ready for ruling.

This circuit, along with others that have considered the question, requires a showing of exceptional circumstances before discovery is taken from high-ranking government officials. *See In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995); *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993); *In re United States*

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(Reno), 197 F.3d 310, 314 (8th Cir. 1999). Counsel cited one case involving an attempt to obtain deposition testimony from Congress members allegedly involved in formulating a state redistricting plan, *Cano v. Davis*, 211 F. Supp.2d 1208 (C.D. Cal. 2002). In that case, the court applied the exceptional circumstances requirement and quashed subpoenas directed to two congressmen regarding the redistricting process in their state, pending further developments in the case. *See id.* at 1227, n.21; No. 01-08477, (C.D. Cal. March 28, 2002) (Order granting motions to quash subpoenas).

Plaintiffs and intervenors assert that Congressmen DeLay and Barton may provide testimony or documents relevant to the intent of the Texas legislature in enacting the challenged redistricting plan. At this early stage, before the plaintiffs and intervenors have presented evidence as to whether the redistricting plan has an unconstitutional or statutorily prohibited effect, this court cannot conclude that such testimony or documents are "essential to [the] case," *In re FDIC*, 58 F.3d at 1062, or whether plaintiffs and intervenors can obtain the information sought from other sources. The record now before this court does not demonstrate that exceptional circumstances justifying the discovery sought are present.

The motion to quash is granted, without prejudice to reconsideration if developments at trial or otherwise enable the parties seeking the discovery to demonstrate that exceptional circumstances make it appropriate.

SIGNED on December 1, 2003.

PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE

T. JOHN WARD
UNITED STATES DISTRICT JUDGE

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